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In The
Supreme Court of the United States

W.R. GRACE & CO., KOOTENAI DEVELOPMENT, CORP., and W.R. GRACE & CO. – CONN.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Ninth Circuit erred, and created a conflict with the Eighth and Tenth Circuits, by holding that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended, 42 U.S.C. §§ 9601–9675, requires a responsible party to pay the entire cost of an environmental response action of potentially unlimited scope and duration, undertaken without any consideration of cost or cost-effectiveness, without being allowed to challenge whether all or part of that action was necessary to contain or abate an immediate environmental hazard?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief on behalf of itself in support of Petitioners. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a non-profit, membership public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every state of the country. A large number of MSLF's members work in businesses involved in the utilization and development of natural resources and, as a result, are involved actively in many environmental issues. Moreover, MSLF and its members have an interest in ensuring that federal laws and regulations, including the Comprehensive Environmental Response, Compensation, and Liability Act, are implemented and enforced in a manner intended by Congress and consistent with the Constitution of the United States.

[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than MSLF, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

For decades, American factories, refineries, mines, and other business enterprises disposed of hazardous wastes in the cheapest possible manner, with little or no concern for human health or the environment. In response, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601–9675, to fill the perceived gap in environmental protection caused by inactive and abandoned hazardous waste sites. The purpose of CERCLA is twofold: 1) to protect the public and the environment by forcing the prompt cleanup of hazardous waste sites, and 2) to ensure that the costs of such cleanup efforts are borne by responsible parties rather than by American taxpayers. CERCLA is triggered if a release or threatened release of a hazardous substance has occurred. 42 U.S.C. § 9604. Once triggered, CERCLA provides a mechanism by which the Environmental Protection Agency ("EPA") can clean up the site using monies from the "Superfund," and then seek reimbursement from potentially responsible parties ("PRPs"). *Id.* §§ 9604 (providing for response actions by the Federal government), 9607(a)(4)(A) (providing liability for "all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan"), 9611 (establishing the "Superfund" to provide federal monies for hazardous waste site cleanup).

In CERCLA, Congress created a two-category system for the cleanup of hazardous waste sites: "removal" actions and "remedial" actions. Although the statutory definitions of "removal" and "remedial" are less than a picture of clarity, removals generally have been thought of as short-term, interim actions taken to prevent imminent harm and to keep a release of contaminants from getting worse. *Exxon Corp. v. Hunt*, 475 U.S. 355, 360 (1986); *Gen. Elec. Co. v. Envtl. Prot. Agency*, 360 F.3d 188, 189 (D.C. Cir. 2004) (*per curiam*). Remedial actions, on the other hand, are permanent remedies for a site, generally comprising the long-term treatment or containment of the hazardous substance. *Id.* While courts have developed several tests in their attempts to delineate "removal" and "remedial" actions, the Ninth Circuit's treatment of the issue in the instant case completely obliterates any distinction intended by Congress. Therefore, this Court should grant Petitioners' *Petition for Writ of Certiorari* in order to clarify this important area of federal environmental law.

ARGUMENT

I. CONGRESS EXPRESSLY CREATED A TWO-CATEGORY SYSTEM OF HAZARDOUS SUBSTANCE CLEANUPS UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT ("CERCLA").

In CERCLA, Congress expressly created a two-category system of hazardous substance response: removal and remedial actions. "Removal" action is defined as any measure taken to "prevent, minimize, or mitigate damage to the public health welfare or to the environment." 42

U.S.C. § 9601(23). Removals generally are thought of as short-term, interim actions taken to prevent imminent harm and to keep a release of contaminants from getting worse. *Exxon Corp.*, 475 U.S. at 360; *Gen. Elec. Co.*, 360 F.3d at 189. "Remedial" action, on the other hand, refers to the permanent remedy for a site, which generally comprises long-term treatment or containment of the hazardous substance. *Id.*; 42 U.S.C. § 9601(24).

The distinction between a "remedial" action and a "removal" action is significant in three principal contexts: 1) removals and remedies are subject to different requirements under the National Contingency Plan ("NCP"); 2) remedial actions financed by the Superfund require listing on the National Priorities List ("NPL") prior to action, while removals do not; and 3) CERCLA provides for different limitation periods for the recovery of remedial and removal costs. *See* Jerry L. Anderson, *Removal or Remedial? The Myth of CERCLA's Two Response System*, 18 Colum. J. Envtl. L. 103 (1993) (providing an analysis of the differing uses of "removal" and "remedial" actions under CERCLA). Most applicable to the instant *Petition* are the differing requirements under the NCP and the listing requirements on the NPL.

The NCP tries to balance concerns for health, safety, and the environment with fairness to PRPs and other interested parties. Because an urgent response generally is required for removals, the NCP places few restraints on that type of action. *See* 40 C.F.R. § 300.700(c)(4). For remedial actions, however, the goals of fairness and efficiency may be served best by more careful contemplation of risks and response alternatives; accordingly, the NCP imposes greater requirements for remedial actions. The NCP requires far more for remedial actions in terms

of planning, choice of action, and public comment than it does for removal actions. For example, to be consistent with the NCP, the remedial alternative selected will be evaluated on its effectiveness, implementability, and cost effectiveness. 40 C.F.R. § 300.430(e)(9)(iii), 300.430(i). "The differences grow primarily from the assumption that removal actions must be taken quickly, without the delay associated with extensive study and public comment." Anderson, *supra*, 18 Colum. J. Envtl. L. at 112. Moreover, CERCLA requires the NPL listing criteria be used "for the purpose of taking remedial action and, to the extent practicable taking into account the potential urgency of such action, for the purpose of taking removal action." 42 U.S.C. § 9605(a)(8)(A). Courts have interpreted this language to require NPL listing as a prerequisite for Superfund-financed remedial actions, but not for removal actions. *See, e.g.*, *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1046–47 (2d Cir. 1985). Because the NPL is a feature of the NCP, failure to list a site renders any remedial action to clean up the site inconsistent with the NCP. Therefore, the failure to list a site on the NPL bars any cost recovery for Superfund-financed remedial actions. *E.g.*, *Carroll v. Litton Sys., Inc.*, 1995 WL 56862, at *7 (4th Cir. 1995).

The distinction between removal and remedial actions is, in part, to protect PRPs from unnecessarily broad response actions, *i.e.*, remedial actions guised as removals. That is, the EPA's authority to conduct short-term removal actions must be balanced with the PRP's interests in not being forced to pay for response actions beyond that necessary to prevent imminent harm to human health or the environment.

II. COURTS HAVE PERMITTED, AND MUST CONTINUE TO PERMIT, A POTENTIALLY RESPONSIBLE PARTY ("PRP") TO DISPUTE ELEMENTS OF A RESPONSE ACTION THAT ARE INCONSISTENT WITH THE NATIONAL CONTINGENCY PLAN ("NCP").

It is well established that the burden of proof is on the defendant in a CERCLA cost recovery action to show that the government's costs are inconsistent with the NCP. In order to show that a government response is inconsistent, the defendant must show that the EPA acted arbitrarily, capriciously, or otherwise not in accordance with law. *United States v. Hardage*, 982 F.2d 1436, 1442 (10th Cir. 1992). CERCLA provides that the EPA may conduct a removal action when "there is a substantial threat of release into the environment . . . which may present an *imminent and substantial danger* to the public health or welfare." 42 U.S.C. § 9604(a)(1) (emphasis added). Therefore, by extension, any action that is not in response to an imminent and substantial danger cannot be in furtherance of a "removal" action. Moreover, a removal action is limited statutorily to a one-year, $2-million cap, unless the EPA finds the response action is "*immediately* required to prevent, limit or mitigate an emergency," and that "there is an *immediate risk* to public health or welfare or the environment." *Id.* § 9604(c)(1). Again, by extension, any action that is not in response to an immediate risk, therefore, cannot be in furtherance of an "emergency removal."

As a result, any action by the EPA that is not in response to an immediate risk cannot be denominated a "removal" or an "emergency removal" under CERCLA without violating the arbitrary and capricious standard because any such denomination would not be in accordance

with federal law. Therefore, those response costs cannot be in accordance with the NCP and, accordingly, the EPA cannot be awarded its response costs for those actions.

Moreover, a PRP must be allowed to evaluate and dispute, if necessary, any response action by the EPA that is not in response to an immediate threat to human health or the environment. Despite the Ninth Circuit's lament to the contrary, *see, e.g.*, *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1245, 1250 (9th Cir. 2005), courts should be required to permit just this sort of in-depth probing into the EPA's response action. To otherwise hold, the PRP would have no recourse at all and the EPA would have a blank check to conduct whatever cleanup it alone deemed necessary, even if the expense was grossly excessive and the action itself was objectively unnecessary to protect against an *immediate risk*.

This analysis was upheld expressly by the Eighth Circuit in *Minnesota v. Kalman W. Abrams Metals, Inc.*, 155 F.3d 1019 (8th Cir. 1998). In *Abrams Metals*, Minnesota brought a cost-recovery action against a PRP for costs incurred by the state in cleaning up lead-contaminated soils. Because the site cleanup was permanent in nature and the agency dealt with the problem in a "leisurely" manner, the Eighth Circuit held the response action a remedial action, not a removal. *Id.* at 1024. Further, the Eighth Circuit held that some of the procedures utilized by the State in its cleanup failed to meet NCP standards. As a result, those costs were not permitted to be recovered from the PRP. *Id.* at 1024–1026 ("It is important to everyone that *necessary* environmental remediation be timely completed as cost effectively as possible. Therefore, the kind of arbitrary and wasteful agency action that occurred in this case cannot be rewarded.") (emphasis added). Thus,

the *Abrams Metals* case stands as an illustration of a court providing just the sort of hard look at the State's cleanup efforts compliance, on a cost-by-cost basis, that Petitioners ask this Court to require of the Ninth Circuit.

III. THE NINTH CIRCUIT'S DECISION IN THE INSTANT CASE TOTALLY UNDERMINES CONGRESS'S REMOVAL/REMEDIAL SCHEME, EFFECTIVELY CREATING ONE CATEGORY OF RESPONSE.

"CERCLA provides that the selection of response actions shall be upheld 'unless arbitrary and capricious or otherwise not in accordance with law.'" *W.R. Grace*, 429 F.3d at 1232 (quoting 42 U.S.C. § 9613(j)(2)). While the District Court and the Ninth Circuit both deferred to the EPA's determination to "approve a time-critical removal action," the Ninth Circuit correctly took the analysis "one step further:" Was the EPA's response in Libby actually a removal action? *Id.* at 1232–1233. Although the Ninth Circuit attempted to determine if the response action fell within the requirements of a removal, the court failed to analyze the individual components of the response. Instead, the court held that, so long as at least one element of the response was correctly classified, the entire response action could be denominated a "removal." However, by characterizing the entire response action in Libby as a "removal," the EPA circumvented the procedural safeguards statutorily allowed PRPs. A PRP is not permitted pre-enforcement review, 42 U.S.C. § 9613(h), there are no alternatives analyses for emergency removal actions, 40 C.F.R. § 300.415(b)(4), and, if the Ninth Circuit's holding is permitted to stand, a PRP has no recourse in court to challenge individual removal action decisions.

Further, under the Ninth Circuit's holding, there would be no procedural protections to prevent the EPA from finding a removal necessary in Libby, and then tying cleanup efforts in other locations to that removal. Under the EPA's and Ninth Circuit's reasoning, Grace would be prevented from ever disputing an EPA decision that the processing sites in Denver, Colorado, or Portland, Oregon, or any of the multitude other sites (at its peak production, the Libby mill produced up to 80 percent of the world's supply of vermiculite, much of which was used in commercial or residential applications), should be cleaned up as part of the "single, cohesive removal action." *W.R. Grace*, 429 F.3d at 1237 ("We refrain from slicing and dicing the EPA's single, cohesive removal action into a myriad of fractured parts."). After all, this is how the EPA included homes and commercial spaces in Libby that contained *finished* vermiculite insulation.

Moreover, under the Ninth Circuit's reasoning, the EPA has no incentive to list a site on the NPL ever. Indeed, the EPA has an incentive to classify any response action as a "removal," and, so long as the courts can identify one element as properly classified, the entire response action can then proceed without any of the procedural safeguards provided by Congress, an effect that Congress could not have intended.

CONCLUSION

In this case, the Ninth Circuit clearly let an extraordinary fact pattern drive its decision. A careful review of the response action propounded by the EPA should have led the court to determine that at least some of the activities performed by EPA were not necessary or consistent with an

"emergency removal" of hazardous substances; for example, there could not possibly be an *imminent* threat to human health caused by asbestos-containing vermiculite located under a parking lot or firmly contained within building materials not subject to disturbance. Although "complete exposure pathways" were identified, that alone is not enough to extend the scope of a removal action to such a broad extent as was done by the EPA in this case. The result is that the EPA conducted a remediation of the entire town of Libby, guised as a "removal action," without observing any of the procedural safeguards provided by CERCLA, safeguards provided, in part, to protect PRPs from just this sort of action. While the EPA is free to conduct whatever response action it deems necessary; it may not circumvent statutory law and then be rewarded with all response costs. That would be contrary to CERCLA and any reasonable sense of substantial justice and fairness.

For the foregoing reasons, Mountain States Legal Foundation respectfully requests that this Court grant Petitioners' *Petition for Certiorari* in order to determine the proper delineation between "removal" and "remedial" actions under CERCLA, an important question of federal law that has not been, but should be, settled by this Court.

Respectfully submitted,

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